95-765

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

HEIDI SANCHEZ, a minor, by and through her next friend, parent, and guardian, PEARL DIFERDINANDO f/k/a PEARL SANCHEZ and PEARL DIFERDINANDO f/k/a PEARL SANCHEZ, Individually,

Petitioners,

v.

SCHOOL DISTRICT 9-R,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeals, State Of Colorado

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state court action filed pursuant to 42 U.S.C. § 1983 which alleges that a public school district has acted with "deliberate indifference" toward the rights of a severely handicapped student and denied her an appropriate individualized education requires district decision makers to have "actual notice" of teacher training deficiencies and unsafe facilities or whether "constructive notice" in the form of specific legislation, well defined guidelines and codified federal rules is sufficient to withstand summary judgment.

PARTIES TO THIS PROCEEDING

The names of all parties to this proceeding are as set forth in the caption of the case, to wit, HEIDI SANCHEZ, a minor, by and through her next friend, parent, and guardian, PEARL DIFERDINANDO f/k/a PEARL SANCHEZ and PEARL DIFERDINANDO f/k/a PEARL SANCHEZ, individually, as Petitioners; and SCHOOL DISTRICT 9-R, as Respondent.

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PETITION FOR WRIT OF CERTIORARI

Petitioners herein respectfully pray that a writ of certiorari issue to review the opinion of the Court of Appeals, State of Colorado which decision held that governmental liability asserted under 42 U.S.C. § 1983 cannot be based on an objective showing of "deliberate indifference" to training deficiencies and obvious risk of potential harm.

OPINIONS BELOW

On January 25, 1995, the Court of Appeals, State of Colorado, Division II, issued the opinion upon which review is now sought. This decision affirmed a trial court ruling issued October 18, 1993, by the District Court, La Plata County, Colorado, Division 2 in case number 90CV117. These opinions separately held that Petitioners could not pursue a civil rights claim filed under 42 U.S.C. § 1983 absent a showing that governmental decision makers had actual notice and subjective knowledge of training deficiencies and resultant risk of harm. A copy of the appellate court's decision, for which an official citation has yet to be assigned is provided in Appendix A at p. 1a. The trial court's ruling is included in Appendix B at p. 21a.

On August 28, 1995, the Supreme Court of the State of Colorado issued an order denying Petitioners' Writ of Certiorari in case number 95SC190. A subsequent request for rehearing was denied by way of two orders striking said petition dated September 6, 1995 and September 11,

1995. Each of these decisions are unreported. Copies are included in Appendix C at pp. 29a, 31a and 32a.

A prior request for rehearing was denied by the Appellate Court of the State of Colorado on February 23, 1995. [Appendix C, p. 33a.]

The federal question upon which Petitioners base the jurisdiction of this Court was first raised at the trial court level in the complaint filed May 9, 1990. A copy of this pleading is included as Appendix D at p. 35a.

The challenged decisions of the trial court, Appellate Court and Supreme Court of Colorado each addressed timely raised federal issues as amplified hereinbelow.

STATEMENT OF JURISDICTION

The final decision of the Supreme Court of Colorado was entered on August 28, 1995. [Appendix C, p. 29a] A subsequent petition for rehearing was stricken on September 6, 1995 and September 11, 1995. [Appendix C, pp. 31a and 32a] Timely jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

This case addresses and concerns civil rights violations prohibited under 42 U.S.C. § 1983, disregard of federal educational mandates set forth in The Elementary and Secondary Education Act of 1965 [20 U.S.C. § 1400 et seq.] and breach of rules and regulations promulgated

pursuant to the Rehabilitation Act of 1973 as authorized in 29 U.S.C. § 794 and codified in 34 CFR 104 et seq.

Copies of these statutes, as relevant to this Petition, are included verbatim in Appendix E as permitted in the Rules of the Supreme Court of the United States, Rule 14.1(f).

STATEMENT OF THE CASE

Factual Background

This case was initiated in a trial court of the State of Colorado by Petitioner Heidi Sanchez, a disabled 12 year old girl who was severely injured while attempting to perform a physical education exercise while participating in a "regular" classroom assignment under the supervision and instruction of a teacher in the employ of Respondent School District 9-R. While the merits of Petitioners' case have not been tested at trial,[1] the factual context of Heidi's injury was accurately summarized and succinctly addressed in the trial court's order of October 6, 1993, a copy of which is provided in Appendix B at p. 15a:

> "Plaintiff Heidi Sanchez was a 12-year old girl, at the time, who was born with cerebral palsy and limited intellectual capacity. She had been "mainstreamed", or placed into a regular curriculum with non-disabled students. This included a regular physical education class taught by defendant Oetter. On March 8, 1989,

[1] All issues affecting and concerning Respondent's liability were decided by summary judgment motion without trial.

defendant Oetter was conducting at least two gymnastics exercises in the physical education class. One was vaulting, the other was exercise on the parallel bars."

"Plaintiff Heidi Sanchez received her injury while participating in the vaulting exercise. Heidi Sanchez was three to five years behind her stated age in physical abilities, and also had severe mental deficiencies. Defendant Oetter was aware of Heidi's abilities and had tested Heidi's physical deficiencies in 1984."

"Defendant Oetter expected Heidi to participate in the class activities like the other, non-disabled students. Defendant Oetter did not provide individualized instruction to Heidi concerning what the vaulting exercise required and what Heidi might be able to perform."

"The vaulting exercise is a potentially dangerous one. It requires a "spotter" to assist in safe completion of the exercise. Defendant Oetter was not "spotting" or assisting in the vaulting exercise. She told the students to do the spotting, but did not instruct them in proper spotting techniques, nor where to stand while spotting. Defendant Oetter offered six different vaulting exercises, which required different spotting techniques and spotter placement."

"Defendant Oetter knew that Heidi would probably not be able to do some of the vaults. Defendant Oetter did not adjust the height of the vaulting equipment to conform to Heidi's ability."

"Plaintiff Heidi was the only disabled child in the class. Defendant Oetter was not watching while Heidi performed the vaulting exercise.

> Defendant Oetter was spotting non-disabled children at the parallel bars exercise, and had her back to the vaulting area."
>
> "Defendant Oetter had not asked for a teacher's aide or other assistance for Heidi in the physical education class. Such aides were available and would have been provided upon request. Instead, she left it to fifth-grade girls to do the spotting."

Legal Context

At the time of this injury, Respondent District 9-R was the recipient of federal monies and subject to Congressional statutes and codified rules requiring that teachers be adequately trained with the handicapped in mind. 20 U.S.C. §§ 1400(b)(7)(8); (c); 1413(B). Respondent 9-R had an affirmative duty to provide each disabled student with an individualized education plan tailored to that pupil's unique limitations. 20 U.S.C. § 1401(19); 34 CFR 104.33.

These legal obligations were properly recognized by the trial court in its October 6, 1993 order as follows [Appendix B, p. 15a]:

> "The federal act both funds and regulates state assistance to disabled students. *Students of Cal. School for the Blind v. Honig*, 736 F.2d 538 (1984). 20 U.S.C. § 1412 requires that in order to receive federal funding, a state must have in effect a policy 'that assures all children with disabilities the right to a free appropriate public education.' While standing alone that right might be abstract, further definitions and guidance are provided.

> A 'free appropriate public education means special education and related services that . . . meet the standards of the State educational agency . . . and are provided in conformity with the individualized education program required' for each student. 20 U.S.C. § 1401(18). Further, 'special education means specially designed instruction . . . to meet the unique needs of a child with a disability including . . . instruction in physical education.' 20 U.S.C. § 1401(16). Finally, 'related services means . . . supportive services . . . as may be required to assist a child with a disability to benefit from special education.' 20 U.S.C. § 1401(17).
>
> In essence then, the federal statute assures plaintiff Heidi Sanchez the right to specially designed instruction in physical education to meet her unique needs, including such supportive services as may be required to assist her to benefit from that specially designed instruction.
>
> Plaintiffs have shown the existence of a clearly established federal right – the right to specifically designed instruction in physical education to meet Heidi Sanchez's unique needs."

Policy Vacuum

Notwithstanding this federally mandated right to individualized education, Respondent School District 9-R gave minimal attention to its handicapped students. It ignored their obvious impact on the classroom, the need for specially trained teachers and potential effect on other students. District 9-R totally disregarded the physical

limitations, academic needs and special educational demands of handicapped pupils under its jurisdiction.

Instead, the District, as a matter of policy – adopted no policy. It categorically, purposely and knowingly ignored the training mandates set forth in 20 U.S.C. §§ 1400(b)(7), 1413(B) and 34 CFR 104.33. Respondent conducted *no* teacher training workshops, drafted *no* new procedures, adopted *no* specialized curriculum, undertook *no* modification of its equipment and hired *no* additional aides. It implemented *no* supportive services designed to assure safe, adequate or appropriate physical eduction for its disabled elementary school students.

Rulings Below

Despite Respondent's inaction and almost total administrative neglect, the Colorado trial court, on summary judgment, ruled that section 1983 liability could not be maintained absent an "official policy" which specifically authorized or effectively permitted Respondent's employees to violate federally protected rights. The court further held that such misconduct must have been actually known to and subjectively noticed by District administrators before liability could be imposed. [Appendix B, pp. 24a and 25a]

This same analysis was subsequently adopted by the Colorado Appellate Court in its decision holding that Petitioners "must allege conduct pursuant to an official policy or custom that was the cause of the constitutional violation. . . . " The Appellate Court concluded that unless District administrators had actual "notice of . . . training deficiency or . . . improper acts [it] could not be

deliberately indifferent to the situation." [Appendix A, p. 6a].

In pursuing this Writ, Petitioners contend that these state court opinions are contrary to controlling decisions of this Court, in conflict with the spirit and purpose of federal law and violative of public policy. If permitted to stand, these rulings would allow a governmental entity which has accepted federal money earmarked for a specific purpose to ignore its statutory obligations and thereafter turn a "blind eye" to the effects of its inaction – all with impunity. Such a position cannot stand.

REASON FOR GRANTING WRIT

Certiorari should be granted inasmuch as the state court opinions rendered below conflict with federal statutes, codified rules and controlling decisions of this Court.

Federally Protected Rights at Issue

The basic purpose of 42 U.S.C. § 1983 is to provide compensation for injuries suffered as the result of civil rights violations and deprivation of federally protected benefits. *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 106 S.Ct. 2537, 91 L.Ed.2d 249 at 259 (1986). Governmental decisions which circumvent mandatory federal duties or which violate protected rights and privileges are actionable under 42 U.S.C. § 1983. *Monell v. New*

York City Dept. of Social Services, 436 U.S. 458, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

In the present case, Petitioner Sanchez is the recipient of such a protected legal benefit. Under federal law, she has an absolute right and unconditional entitlement to a "free appropriate public education . . . specifically designed . . . to meet [her] unique needs as a handicapped child." 20 U.S.C. § 1400(c) and § 1401(16) through (19). This federally protected right includes safe and appropriate "instruction in physical education." 20 U.S.C. § 1401(16); 34 CFR 104.37.

Adequate Teacher Training Required

In order to better provide "effective" educational benefits to handicapped students, the same enactment which created Petitioner's right to a "free and appropriate education" simultaneously imposed curriculum guidelines and training requirements on local educators. School districts must formulate "individualized education programs" to be implemented by "appropriately and adequately prepared" personnel whose training is maintained by "continuing education." 20 U.S.C. §§ 1400(b)(7); 1401(19); 1413(B); 1414(5); 34 CFR 104.33. "[H]andicapped students' teachers must be trained in the instruction of persons with the handicap in question and appropriate materials and equipment must be available." 34 CFR 104, Appendix A, Subpart D.

Unfortunately this adequate training requirement was lost on Respondent School District. Its federal obligation to provide a safe learning environment supported by properly prepared teachers never reached Petitioner's

physical education class. Respondent 9-R did not provide teacher training courses for its physical education instructors. It did not draft any new curriculum guidelines or issue safety instructions for use by its personnel. It did not hire any teacher aides or make use of any assistants for the benefit of handicapped students. It did not modify its physical educational program in any degree. Instead, School District 9-R took federal funds and left Heidi Sanchez, and similarly situated students, with inadequate teacher support, untrained personnel and insufficient protection against obvious risks of injury, ridicule and educational failure.

These deficiencies were properly plead and zealously asserted by Petitioner during the course of state court proceedings. They were readily recognized by the trial court:

> "In this case the plaintiffs have alleged such deliberate indifference on the part of the school board in not providing supplemental aids, special services and special educators to handicapped children as required by state and federal statutes and have alleged that these omissions were the proximate cause of the child's injuries." [Appendix B, p. 12a]

Unfortunately these observations were given little, if any, weight by the state court tribunals. Petitioner's argument and assertion of constructive notice, obvious safety risks and inadequate teacher training were given minimal judicial consideration. Absent actual knowledge of "training deficiencies" the lower courts held Respondent School District 9-R immune from § 1983 liability. [Appendix A, p. 6a and Appendix B, p. 24a]. This reasoning is in

conflict with the objective test applied by this Court in inadequate training cases.

Inadequate Training May Trigger Civil Rights Violation

Recent decisions of this court have recognized that § 1983 liability may be properly asserted when a governmental entity's failure to adequately train its personnel puts the exercise of federal rights in jeopardy. *Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989); *Springfield v. Kibbe*, 480 U.S. 257, 269 (1987) (O'Conner, J., dissenting).

Contrary to the state court opinions below, personnel training deficiencies and their intended risks need not be within the subjective knowledge of governmental decision makers. As noted in *Parratt v. Taylor*, 451 U.S. 527 (1981) "Section 1983 . . . has never been found by this Court to contain a state of mind requirement." accord *Daniel v. Williams* 474 U.S. 327, 329 (1986). Accordingly, training inadequacies need not rise to the level of an officially sanctioned or purposely enacted "policy or custom." Instead, this court has recognized that *inaction* which rises to the level of "deliberate indifference" may be sufficient. *Springfield v. Kibbe*, 480 U.S. 257, 269 (1987) (O'Conner, J., dissenting).

Objective Test to be Applied

In the course of examining § 1983 claims and training deficiency cases, this Court has properly recognized the "conceptual difficulty [which] would attend any search for the subjective state of mind of a governmental

entity. . . . " *Farmer v. Brennan*, 511 U.S. ___, 112 L.Ed.2d 811, 828, 114 S.Ct. ___ (1994). Accordingly, an *objective* test has been applied in determining whether governmental training deficiencies constitute "deliberate indifference" to protected rights. Where "the need for more or different training [is] so obvious and the inadequacy so likely to result in violation of constitutional rights, . . . [that] the [government] . . . may be said to have been indifferent to the need," liability may properly be imposed. *Canton v. Harris*, 489 U.S.378, 390, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989).

This objective test is particularity applicable in situations where governmental inaction creates an obvious risk of substantial harm. *Rivas v. Freeman*, 940 F.2d 1491, 1495 (11th Cir. 1991); *Cornfield by Lewis v. School District No. 203*, 991 F.2d 1316, 1326 (7th Cir. 1993).

Present Case

Objective knowledge and obvious safety risks characterize the case now before this Court. The task of "mainstreaming" developmentally disabled students into regular classrooms is an obviously high risk endeavor. The introduction of disabled students into regular classrooms creates a new, significant and readily apparent risk of educational disruption and physical injury. The need for specialized training, modified equipment and written policy guidelines are empirically evident. Local school districts, including Respondent 9-R, have an objectively discernable obligation to reduce such risks by instituting

specialized teacher training and drafting appropriate curriculum guidelines. *Jones v. Bd. of Educ. of School District 50*, 854 P.2d 1386 (Colo.App. 1993).

These safety risks and need for adequate teacher training was made all the more obvious to Respondent School District 9-R, and its officials, by way of federal statutes and codified rules which put local school districts on constructive notice as to their instructional duties, safety obligations and educational responsibilities toward handicapped pupils. 20 U.S.C. §§ 1400(b)(7),(c); 1401(16)-(19); 1413(a)(3)(B); *Reynolds v. Borough of Avalon*, 799 F.2d 442, 446, n.4 (D.N.J. 1992).

Paraphrasing this Court's decision in *Canton*, supra, the need for more or different training should have been obvious to School District 9-R and its officials. Glaring teacher inadequacies, the absence of appropriate policy or curriculum guidelines directed toward handicapped students and the lack of modified equipment or reduced instructional expectations created a readily apparent risk of substantial harm and an obvious violation of protected education rights. On these facts, Respondent "may be said to have been indifferent to the need". Accordingly, Petitioners should have been permitted to pursue their § 1983 remedies notwithstanding the District's subjective ignorance.

CONCLUSION

Respondent must not be permitted to knowingly divert federal monies specifically appropriated for teacher training and then feign ignorance when training

deficiencies cause physical injury. Objective indifference – not subjective knowledge – is determinative.

Accordingly, Petitioners respectfully pray that a Writ of Certiorari to the Court of Appeals, State of Colorado issue forthwith.

Dated November 13, 1995

Respectfully submitted,

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APPENDIX A

COLORADO COURT OF APPEALS January 26, 1995
No. 93CA1870

Heidi Sanchez, a minor, by and through her next friend, parent, and guardian, Pearl DiFerdinando f/k/a Pearl Sanchez and Pearl DiFerdinando f/k/a Pearl Sanchez, Individually,

Plaintiffs-Appellants,

v.

School District 9-R,

Defendant-Appellee.

Appeal from the District Court of La Plata County
Honorable Timothy A. Patalan, Judge
No. 90CV117

Division II JUDGMENT AFFIRMED
Opinion by JUDGE PLANK
Hume and Roy, JJ., concur

James C. Anesi, P.C., James C. Anesi, Durango, Colorado, for Plaintiffs-Appellants

Caplan and Earnest, Susan S. Schermerhorn, Kathleen O. Nostico, Boulder, Colorado; Shand, McLachlan & Newbold, Michael E. McLachlan, Durango, Colorado, for Defendant-Appellee

Plaintiffs, Heidi Sanchez and her mother, Pearl DiFerdinando, appeal from the summary judgment entered in favor of defendant, School District 9-R. We affirm.

Sanchez was born with cerebral palsy and limited intellectual capacity. She was "mainstreamed" into a regular public school curriculum with non-disabled students. Her curriculum included a regular physical education class. During one of the gymnastics classes in which vaulting and parallel bars exercises were being taught, Heidi attempted to perform a vaulting exercise and fell, injuring her knee.

Plaintiffs filed this action under 42 U.S.C. §1983 (1988), seeking damages for Heidi's injury on the ground that, by allowing a situation to arise in which Heidi received physical injuries, defendant had violated Heidi's federal statutory rights, as a disabled child, to a "free and appropriate public education." 20 U.S.C. §1400 et seq. (1988 & Supp. V 1993). DiFerdinando asserted a consortium claim derivative of Heidi's civil rights claim. Additionally, plaintiffs asserted a common law tort claim under the exception to the Colorado Governmental Immunity Act for an unreasonably dangerous condition of a public building.

On defendant's motion, the summary judgment challenged here was entered in defendant's favor on all three of the claims asserted in the complaint.

I.

Plaintiffs first argue that the trial court erred in granting defendant's motion for summary judgment on plaintiffs' 42 U.S.C. §1983 claim. We disagree.

42 U.S.C. §1983 serves as a vehicle for providing remedies to individuals deprived of rights granted to

them by the U.S. Constitution and federal statutes. In a §1983 claim against a local governmental unit, including a school district, the plaintiff must allege conduct pursuant to an official policy or custom that was the cause of the constitutional violation; a local government will not be held liable for the acts of its employees simply pursuant to a theory of respondeat superior. *Monell v. Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *see also Rogers v. Board of Trustees,* 859 P.2d 284 (Colo. App. 1993).

An official policy or custom sufficient to impose §1983 liability on a local government unit may be shown by: 1) an officially adopted policy or decision to deprive persons of their federal constitutional or statutory rights; 2) a pattern of "persistent and widespread" practices resulting in such a deprivation; or 3) official inaction reflecting "deliberate indifference" to those protected rights. *Monell v. Department of Social Services, supra; City of Canton v. Harris,* 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989).

In their §1983 claim, plaintiffs contended that defendant had failed to provide special education and supportive services and aides for handicapped children mainstreamed into regular physical education classes and that this failure resulted in a custom or policy which violated Heidi's federal statutory right to a free and appropriate education. They also allege the same result from defendant's failure adequately to train its physical education teacher and student spotters to meet Heidi's special needs.

The dispositive issue thus becomes whether, under these allegations, there existed an unresolved issue of material fact, and whether defendant was entitled to judgment as a matter of law. *See Mancuso v. United Bank,* 818 P.2d 732 (Colo. 1991).

A. Official Policy

Section 1983 liability may be imposed on the basis of an officially adopted policy or decision only if a governmental policymaker makes a deliberate choice to follow a course of action from among various alternatives. *Pembaur v. City of Cincinnati,* 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986); *Monell v. Department of Social Services, supra.*

The evidence provided by both defendant and plaintiffs demonstrated that, contrary to plaintiffs' position, defendant's official policy with respect to educating disabled children was designed to ensure that those children did in fact receive the free and appropriate education to which they were entitled under federal law. As such, a necessary element for recovery under §1983 was not sustainable by plaintiffs, and thus, defendant was entitled to summary judgment.

Plaintiffs, however, argued that the physical education teacher was a policymaker and the manner in which she individually conducted her class amounted to an official policy which was the cause of Heidi's injury. Despite this assertion, plaintiffs failed to provide any evidence that defendant had vested policymaking authority in the physical education teacher with respect to decisions she made in her day-to-day teaching duties. The

alleged neglect by the teacher is not a policymaking act, and thus, plaintiffs' allegation amounts only to a §1983 claim on the basis of respondeat superior. Such a claim cannot lie. *Monell v. Department of Social Services, supra.* Further, plaintiffs have identified no basis in Colorado law for their conclusion that a teacher performing her teaching duties is a policymaker for purposes of §1983, and we can find no such basis.

B. Persistent and Widespread Practice

Section 1983 liability may also be imposed on a local government for practices which, although not officially adopted by policymakers, become so permanent and well settled as to have the force and effect of law. *Monell v. Department of Social Services, supra.*

Plaintiffs have not asserted even the possibility of a widespread, ongoing practice of improper mainstreaming of disabled students into regular physical education curricula within the district. Rather, their entire claim is premised on the allegedly improper acts of an individual teacher, in an individual class, during one classroom exercise.

C. Official Inaction Resulting in Deliberate Indifference

Finally, §1983 liability may be imposed on a local governmental unit when it demonstrates a policy of "deliberate indifference" to a person's federal rights. However, before liability will be imposed on this basis, it must be demonstrated that governing officials were

aware of the problem and chose to ignore it. *City of Canton v. Harris, supra; see also Jones v. Board of Education of School District 50,* 854 P.2d 1386 (Colo. App. 1993).

Here, plaintiffs alleged that the failure of the district adequately to train its physical education teacher and spotters, as well as a variety of individual acts by the physical education teacher, resulted in Heidi's injury. However, they failed to demonstrate that defendant had any notice of this training deficiency or of the improper acts; without notice, defendant could not be deliberately indifferent to the situation.

Plaintiffs failed to present evidence supporting any of the three possible grounds for recovery under §1983. Their claim amounts only to an allegation of simple negligence, which is not actionable under §1983. Therefore, summary judgment in favor of defendant on Heidi's §1983 claim was proper.

II.

Plaintiffs assert that if Heidi's §1983 claim survives, so does her mother's consortium claim. The converse is also true: if Heidi's §1983 claim fails, her mother's claim fails as well. *Daniels v. Williams,* 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). Thus, because we conclude summary judgment in favor of defendant was properly granted on Heidi's claim, and because DiFerdinando's consortium claim is derivative of Heidi's claim, *see Lee v. Colorado Department of Health,* 718 P.2d 221 (Colo. 1986), the consortium claim cannot survive, and we need not reach the issue of whether a consortium claim by a parent for a child's injuries exists under §1983. Hence, summary

judgment in favor of defendant on the consortium claim was proper.

III.

Finally, plaintiffs contend that the trial court erred in granting summary judgment in favor of defendant on plaintiffs' common law tort claim against defendant. Defendant had moved for summary judgment on this claim on the grounds that the Colorado Governmental Immunity Act (CGIA), §24-10-101, et seq., C.R.S. (1988 Repl. Vol. 10A), barred plaintiffs' claim. We are not persuaded by plaintiffs' arguments.

As an initial matter, and although the parties did not raise the issue, we recognize that the question of whether sovereign immunity has been waived is one of subject matter jurisdiction that is to be determined under C.R.C.P. 12(b)(1), rather than according to the standards for summary judgment. *See Trinity Broadcasting of Denver, Inc. v. City of Westminster,* 848 P.2d 916 (Colo. 1993). However, because we are satisfied that all relevant evidence was presented to the trial court in connection with the motion for summary judgment, we may review the immunity issue without remanding the matter to the trial court for an evidentiary hearing on immunity. *See Capra v. Tucker,* 857 P.2d 1346 (Colo. App. 1993).

The CGIA provides:

> (1) A public entity shall be immune from liability in all claims for injury which lie in tort . . . except as provided otherwise in this section. Sovereign immunity is waived

> by a public entity in an action for injuries resulting from:
>
> . . . .
>
> (c) A dangerous condition of any public building.

Section 24-10-106, C.R.S. (1989 Repl. Vol. 10A).

Section 24-10-103(1), C.R.S. (1989 Repl. Vol. 10A) defines a dangerous condition as "a physical condition of a facility *or the use thereof*" which poses an unreasonable risk to the health or safety of the public. (emphasis added) Plaintiffs argue for a construction of the phrase "or the use thereof" as modifying the term "facility." However, our supreme court rejected this argument when it concluded that in order to fall within the above-quoted exception, provided by §24-10-106(1)(c), the dangerous condition must stem from "a physical or structural defect in the [public] building" rather than from an activity conducted within the building. *Jenks v. Sullivan*, 826 P.2d 825, 830 (Colo. 1992) (emphasis added).

It is true that *Jenks, supra,* was partly overruled by *Bertrand v. Board of County Commissioners*, 872 P.2d 223 (Colo. 1994). However, *Jenks* was expressly overruled only to the extent that it concluded that the exceptions to the CGIA were in derogation of the common law and must be strictly construed. The construction of the statutory public building exception which the court adopted in *Jenks* was left untouched by *Bertrand, supra,* and therefore, we must follow it today. *See Dipaolo v. Boulder Valley School District RE-2*, ___ P.2d ___ (Colo. App. No. 94CA0295, January 12, 1995) (similarly interpreting *Bertrand*.)

To the extent that *Longbottom v. State Board of Community Colleges & Occupational Education*, 872 P.2d 1253 (Colo. App. 1993), relied upon by plaintiffs, and *Hendricks v. Weld County School District No. 6*, ___ P.2d ___ (Colo. App. No. 93CA1764, January 26, 1995) are contrary to this opinion, we decline to follow them.

Accordingly, the trial court's summary judgment in favor of defendant on Heidi's §1983 claim, DiFerdinando's consortium claim, and plaintiffs' common law tort claims is affirmed.

JUDGE HUME and JUDGE ROY concur.

Appeal from the District Court of La Plata County, State of Colorado, to the Colorado Court of Appeals. Opinion issued & Judgment Affirmed January 26, 1995, before Plank, Hume, and Roy, JJ.

COURT OF APPEALS, STATE OF COLORADO
2 East Fourteenth Avenue, Suite 300
Denver, Colorado 80203
(303) 837-3785

MANDATE

Court of Appeals No. 93CA1870
Trial Court No. 90CV117

HEIDI SANCHEZ, ET AL V SCHOOL DISTRICT 9-R

This cause came to be heard on the record on appeal from the District Court of La Plata, State of Colorado, and was argued by counsel. On consideration thereof, it is ordered that the Judgment of said Court is AFFIRMED.

DATE: September 13, 1995

PATRICK STANFORD
Clerk of the Court
(SEAL)
By: /s/ Michelle Espinosa
Deputy Court Clerk

COURT OF APPEALS
STATE OF COLORADO
Certified to be a full, true and correct copy.

DATE: September 13, 1995
Clerk of the Court of Appeals
By: Michelle Espinosa
Deputy Clerk

APPENDIX B

DISTRICT COURT, COUNTY OF LA PLATA,
STATE OF COLORADO

Case No. 90CV117, Division 2

ORDER

HEIDI SANCHEZ, a minor, by and through her next friend, parent, and guardian, PEARL DIFERDINANDO f/k/a PEARL SANCHEZ and PEARL DIFERDINANDO f/k/a PEARL SANCHEZ, Individually,

Plaintiffs,

vs

SCHOOL DISTRICT 9-R, SAN JUAN BOARD OF COOPERATIVE SERVICES and SCHOOL DISTRICT 9-R LOCAL INDIVIDUAL EDUCATION PROGRAM TEAM, including STEVE THWEATT, Individually, SUSAN LIVINGTON, Individually, and LIZ OETTER, Individually,

Defendants.

The Court, having read the file and heard oral argument, now denies the motions of School District 9-R and Liz Oetter for judgment on the pleadings.

The plaintiffs allege that Heidi Sanchez, a handicapped child, was hurt in a regular P.E. gymnastics class and that the deliberate indifference of the school district in providing appropriate training and services to the teacher and the deliberate indifference of the teacher to the needs of the child caused her injuries.

In *Monell v. New York City Department of Social Services*, 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978), the court decided that the municipality could be liable under 42 USC 1983 where the municipality causes the constitutional violation at issue.

In *Canton v. Harris*, 489 U.S. 378, 103 L.Ed.2d 412, 109 S.Ct. 1197 (1989), the Court held that "only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under §1983," 103 L.Ed.2d 427.

In this case the plaintiffs have alleged such deliberate indifference on the part of the school board in providing supplemental aids, special services and special educators to handicapped children as required by state and federal statutes and have alleged that these omissions were the proximate cause of the child's injuries.

DATED this 14th day of May, 1993.

BY THE COURT:

/s/ James D. Childress
James D. Childress
District Judge

JDC/wmb

cc Jim Anesi
Bryson Burnham
Mailed May 14, 1993

DISTRICT COURT, COUNTY OF LA PLATA,
STATE OF COLORADO

Case No. 90CV117, Division 2

FINDINGS and ORDER – MOTION OF ELIZABETH OETTER FOR SUMMARY JUDGMENT DUE TO QUALIFIED IMMUNITY AND CROSS MOTION FOR SUMMARY JUDGMENT OF LIABILITY AGAINST DEFENDANT OETTER

HEIDI SANCHEZ, a minor, by and through her next friend, parent, and guardian, PEARL DIFERDINANDO f/k/a PEARL SANCHEZ and PEARL DIFERDINANDO f/k/a PEARL SANCHEZ, individually,

Plaintiffs,

vs

SCHOOL DISTRICT 9-R, SAN JUAN BOARD OF COOPERATIVE SERVICES and SOCIAL SERVICES and SCHOOL DISTRICT 9-R LOCAL INDIVIDUAL EDUCATION PROGRAM TEAM, including STEVE THWEATT, Individually, SUSAN LIVINGSTON, Individually, and LIZ OETTER, Individually,

Defendants.

In this action, plaintiffs seek damages for civil rights violations pursuant to 42 U.S.C. 1983. The action is a result of alleged injuries suffered by plaintiffs, arising out of a gymnastics vaulting exercise in a fifth-grade physical education class taught by defendant Oetter. Plaintiff

Heidi Sanchez is a disabled child, being educated in the District 9-R public school system.

Defendant Oetter has moved for a summary judgment based upon the qualified immunity granted to governmental employees performing discretionary functions. Plaintiffs have cross-moved for summary judgment against defendant Oetter on the issue of her liability for the damages suffered by plaintiffs. For the reasons stated below, *BOTH MOTIONS ARE DENIED.*

I.

A summary judgment decision regarding qualified immunity is analytically different than for other summary judgment motions. The burden of proof is a shifting one. First, the defendant must raise the issue.

Once raised, the plaintiff bears the burden of presenting facts or allegations to show that the defendant's alleged conduct violated a clearly established federal constitutional or statutory right of the plaintiff. The allegedly violated right cannot be abstract; its contours must be sufficiently clear that a reasonable official would understand what he is doing violates that right.

If that burden is met, the defendant, as movant, must show that no material issues of fact remain whether the defendant's actions were objectively reasonable in light of the law and information the defendant possessed at the time. At that point, the allegations are to be considered in the light most favorable to the plaintiff. *Patrick v. Miller,* 953 F.2d 1240 (10th Cir. 1992); *Martinez v. Harper,* 802 P.2d 1185 (Colo. App. 1990).

The Court is not to decide liability but to determine if there exists a conflict sufficiently material to defendant's claim of immunity to require the defendant to stand trial. Qualified immunity having been raised in this case, plaintiff must now prove a clearly established federal right, and conduct of the defendant that violated that right.

II.

In their complaint, and in response to this motion for summary judgment, plaintiffs have identified the federal statutory right on which they base their claim as that contained in the Education of the Handicapped Act, 20 U.S.C. 1400, *et seq.*, as amended. Contrary to defendant's argument, the rights established by that law are clear and are defined with enough specificity that a reasonable school teacher in defendant Oetter's position would know what is required of her when confronted with a disabled student in a gymnastics vaulting class.

The federal act both funds and regulates state assistance to disabled students. *Students of Cal. School for the Blind v. Honig*, 736 F.2d 538 (1984). 20 U.S.C. 1412 requires that in order to receive federal funding, a state must have in effect a policy "that assures all children with disabilities the right to a free appropriate public education." While standing alone that right might be abstract, further definitions and guidance are provided.

A "free appropriate public education means special education and related services that . . . meet the standards of the State educational agency . . . and are provided in conformity with the individualized education

program required" for each student. 20 U.S.C. 1401(18). Further, "special education means specially designed instruction . . . to meet the unique needs of a child with a disability including . . . instruction in physical education." 20 U.S.C. 1401(16). Finally, "related services means . . . supportive services . . . as may be required to assist a child with a disability to benefit from special education." 20 U.S.C. 1401(17).

In essence then, the federal statute assures plaintiff Heidi Sanchez the right to specially designed instruction in physical education to meet her unique needs, including such supportive services as may be required to assist her to benefit from that specially designed instruction. Defendant's argument, that the right is unclear because the law does not specify the minutia of mat size, number of spotters, required training, etc., is misplaced. Defendant's argument would require the federal government to anticipate and provide by detailed law for the "unique needs" of every theoretical disabled student.

The law does not specifically provide for textbooks and writing materials either, but it does incorporate state standards that provide those items. *Honig, supra.* The same is true for designing instruction in physical education. If a federal right is violated, the fact it may also constitute a public or private wrong under state law or standards does not prevent prosecution of the federal remedies. It is appropriate to look to state law and local standards to determine the contours of the federal right. *See: Patrick v. Miller, supra* (look to state law to determine if plaintiff had a property interest in continued employment so as to give rise to a federal due process right to a pre-termination hearing). This is especially true when, as

in this case, the statute specifically requires compliance with the standards of the State educational agency. 20 U.S.C. 1401(18)(B).

It is also true that the federal statute does not use the term "safe education." That does not lead to the conclusion that considerations of safety can or must be ignored in the analysis of what is appropriate for a particular student.

Plaintiffs have shown the existence of a clearly established federal right – the right to specifically designed instruction in physical education to meet Heidi Sanchez's unique needs. A reasonable physical education teacher would understand the contours of that right, without further federal rules and regulations.

III.

Plaintiff Heidi Sanchez was a 12-year old girl, at the time, who was born with cerebral palsy and limited intellectual capacity. She had been "mainstreamed," or placed into a regular curriculum with non-disabled students. This included a regular physical education class taught by defendant Oetter. On March 8, 1989, defendant Oetter was conducting at least two gymnastics exercises in the physical education class. One was vaulting, the other was exercise on the parallel bars.

Plaintiff Heidi Sanchez received her injury while participating in the vaulting exercise. Heidi Sanchez was three to five years behind her stated age in physical

abilities, and also had severe mental deficiencies. Defendant Oetter was aware of Heidi's abilities and had tested Heidi's physical deficiencies in 1984.

Defendant Oetter expected Heidi to participate in the class activities like the other, non-disabled students. Defendant Oetter did not provide individualized instruction to Heidi concerning what the vaulting exercise required and what Heidi might be able to perform.

The vaulting exercise is a potentially dangerous one. It requires a "spotter" to assist in safe completion of the exercise. Defendant Oetter was not "spotting" or assisting in the vaulting exercise. She told the students to do the spotting, but did not instruct them in proper spotting techniques, nor where to stand while spotting. Defendant Oetter offered six different vaulting exercises, which required different spotting techniques and spotter placement.

Defendant Oetter knew that Heidi would probably not be able to do some of the vaults. Defendant Oetter did not adjust the height of the vaulting equipment to conform to Heidi's ability.

Plaintiff Heidi was the only disabled child in the class. Defendant Oetter was not watching while. Heidi performed the vaulting exercise. Defendant Oetter was spotting non-disabled children at the parallel bars exercise, and had her back to the vaulting area.

Defendant Oetter had not asked for a teacher's aide or other assistance for Heidi in the physical education class. Such aides were available and would have been

provided upon request. Instead, she left it to fifth-grade girls to do the spotting assistance.

Would a reasonable physical education teacher understand that requiring a mentally retarded, 12-year old student with cerebral palsy to perform a vaulting exercise under the above-described circumstances would violate that student's right to instruction in physical education, specially designed to meet the student's unique needs? Plaintiffs have demonstrated sufficient facts to answer that question in the affirmative, and to shift the burden back to the defendant.

In her reply, defendant Oetter has failed to show that no material issue of fact remains concerning the objective reasonableness of her actions on March 8, 1989. The motion for summary judgment must be denied.

IV.

Unlike a motion for summary judgment concerning qualified immunity, special rules do not apply to plaintiffs' cross motion for summary judgment on liability of defendant Oetter. Plaintiffs must show there is no genuine issue as to any material fact. When issues of fact or law exists, the Court cannot grant summary judgment.

Mere negligence is not enough to support an action under 24 U.S.C. 1983. Plaintiffs thus have assumed the duty of proving malice, gross negligence, recklessness, deliberate indifference. Defendant's pleadings, while insufficient to support her motion for summary judgment, raise issues of reasonable mistake. These factual

issues cannot be resolved by summary judgment. Plaintiffs' motion is also denied.

DATED this 6th day of October, 1993.

BY THE COURT:

/s/ Timothy A. Patalan
Timothy A. Patalan

TAP/wmb

cc James Anesi
Michael McLachlan

DISTRICT COURT, COUNTY OF LA PLATA,
STATE OF COLORADO

Case No. 90CV117, Division 2

FINDINGS and ORDER – DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' REMAINING CLAIMS FOR RELIEF

HEIDI SANCHEZ, a minor, by and through her next friend, parent, and guardian, PEARL DIFERDINANDO f/k/a PEARL SANCHEZ and PEARL DIFERDINANDO f/k/a PEARL SANCHEZ, individually,

Plaintiffs,

vs

SCHOOL DISTRICT 9-R, SAN JUAN BOARD OF COOPERATIVE SERVICES and SOCIAL SERVICES and SCHOOL DISTRICT 9-R LOCAL INDIVIDUAL EDUCATION PROGRAM TEAM, including STEVE THWEATT, Individually, SUSAN LIVINGSTON, Individually, and LIZ OETTER, Individually,

Defendants.

This action is the result of injuries allegedly sustained by plaintiff Heidi Sanchez during a physical education class taught by defendant Oetter in the District 9-R school system. Plaintiffs seek money damages pursuant to 42 U.S.C. §1983.

Defendants move for summary judgment on the ground that they had no constitutional duty to provide Heidi Sanchez with a safe education and, even if such a

duty did exist, their actions did not amount to a custom or policy of deliberate indifference. Defendants also contend that plaintiffs' action should be dismissed for failure to exhaust administrative remedies under the Education of the Handicapped Act, 20 U.S.C. 1400, *et seq.*, as amended. Finally, defendants argue that plaintiff DiFerdinando's consortium claim was inadequately pleaded.

Plaintiffs have filed a cross motion for summary judgment on the issue of liability.

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Jones v. Bd. of Educ. of School Dist. 50,* 854 P.2d 1386, 1387 (Colo. App. 1993). In determining whether summary judgment is appropriate, the court must resolve all doubts as to whether an issue of fact exists against the moving party. *Id.* at 1388.

I.

Plaintiffs' Section 1983 claim is premised on defendants' alleged violation of the Education of the Handicapped or Individuals With Disabilities Act (IDEA), 20 U.S.C. §1400, *et seq.* Defendants argue that plaintiffs have no Section 1983 claim because there was no constitutional or federal duty to provide plaintiff Heidi Sanchez with a "safe education."

The IDEA guarantees all disabled children the right to a "free appropriate public education" which includes the right to specially designed instruction and supportive services necessary to meet his or her unique educational

needs. 20 U.S.C. §1401. The Act also requires states which receive federal funding to effect a policy to assure this right. 20 U.S.C. §1412. In Colorado, the statute implementing the IDEA is the Exceptional Children's Educational Act, C.R.S. §22-20-101, *et seq.* Under the Colorado Act, each school district is responsible for providing and administering educational services to disabled children at the local level.

Given the comprehensive statutory scheme created by the IDEA, defendants were required to protect the federal rights conferred upon Heidi Sanchez by the Act. Although the IDEA does not use the term "safe education", the Act placed an affirmative duty on defendants to provide special instruction and supportive services to plaintiff, which must have necessarily included issues of safety. See: this Court's findings and orders on Motion of Elizabeth Oetter for Summary Judgment.

II.

Although defendant School District 9-R had an affirmative duty to provide plaintiff Heidi Sanchez a "free appropriate education" under the IDEA, the District's actions do not reflect a custom or policy of deliberate indifference.

Unlike the IDEA, Section 1983 does not create any substantive rights, but merely provides a federal cause of action for violations of certain federal rights. *Mrs. W. v. Tirozzi*, 832 F.2d 748, 754 (2nd Cir. 1987). A Section 1983 cause of action may be used to remedy constitutional and federal statutory violations by state agents. *Id.* Under Section 1983, a local government entity such as a school

district cannot be held liable pursuant to a theory of respondeat superior for the actions of its employee, but may be liable if an official policy, custom, or decision causes an individual to suffer a constitutional harm. *Monell v. Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). The existence of a custom or policy may be found in persistent and widespread practices which are so permanent and well settled as to have the force of law. *Jones*, 854 P.2d at 1388.

In order to establish liability under Section 1983, plaintiffs must prove the existence of a persistent pattern of unconstitutional misconduct by School District 9-R employees, deliberate indifference to such misconduct by District officials after notice that it has occurred, and injury to plaintiff Sanchez as a result of this persistent custom or policy. *See Jones*, at 1388.

Although Heidi Sanchez has clearly established federal rights under the IDEA, plaintiffs have not demonstrated that a continuing District policy or custom resulted in violation of those rights. Furthermore, even if such a custom or policy did exist, there is no indication that District officials knew, or should have known, of the custom or policy, or that their actions constituted deliberate indifference.

To the contrary, the District has established a program to assure the appropriate education of disabled children and has provided mechanisms for addressing concerns about this program. (Livingston depo., pp. 15, 18-19; Thweatt depo., p. 46, 106-08; Oetter depo., pp. 57-58; Sears depo. p.27). A joint decision was made by plaintiff DiFerdinando and the District to mainstream

Heidi Sanchez into regular physical education classes, and there was no reason to believe that Heidi could not participate in these classes. (Oetter depo., pp. 74-88). In addition, there is no evidence of a widespread practice of improper mainstreaming of disabled students by the District. (Sears depo., pp. 13-16).

Similarly, plaintiffs cannot establish a widespread practice by the District of failing to adequately train its teachers. Defendant Oetter had the required state certification to teach physical education and holds a master's degree with emphasis in adaptive physical education for students with disabilities. (Oetter depo., p. 4). District officials never received complaints regarding defendant Oetter's abilities to work with disabled children or notice of injuries to special education students. (Thweatt depo., p. 87).

The District requires teachers to follow a specific curriculum which includes explicit provisions regarding safety. (Teacher's Manual, pp. 1-2). Plaintiffs have shown no continuing pattern of misconduct by defendant Oetter or other teachers with respect to District curriculum. (Oetter depo. pp. 170-71, 194). If defendant Oetter did in fact turn her back on plaintiff during the vaulting exercise and fail to provide adequate spotters, there is no evidence establishing that this practice was widespread or that the District had reason to know of such practice.

Absent proof of a custom or policy of deliberate indifference, plaintiffs cannot establish a Section 1983 action against the District for violation of Heidi Sanchez' rights under the IDEA. Plaintiffs have not provided that proof in response to defendants' motion. Accordingly,

Defendants' Motion for Summary Judgment on plaintiffs' Section 1983 claim against defendant School District 9-R is granted.

III.

Defendants contend that plaintiffs' Section 1983 action must be dismissed due to plaintiff DiFerdinando's approval of Heidi's individualized education program and for failure to exhaust the IDEA's administrative remedies.

The IDEA imposes elaborate procedural requirements and allows parents of disabled children to be given an opportunity to bring complaints relating to the identification, evaluation, and educational placement of their child, or any matter relating to the provision of a "free appropriate education." 20 U.S.C. §1415(b). The IDEA does not provide the exclusive remedy for redress of complaints. Pursuant to 20 U.S.C. §1415(f), remedies are also available under other federal statutes which protect the rights of disabled children. If relief sought under federal statutes is also available under the IDEA, it is first necessary to exhaust the administrative remedies set forth in the Act. *Hayes v. Unified School Dist. No. 377*, 877 F.2d 809, 811 (10th Cir. 1989). Section 1983 may be used as a remedy to enforce IDEA educational rights, subject to the Act's existing exhaustion requirements. *Tirozzi*, 832 F.2d at 751. Exhaustion of administrative remedies is not required if adequate relief is not available under the IDEA, or if pursuit of such relief would be futile. *Hayes*, at 814.

While it is true that challenges to the evaluation and placement of a disabled child under the IDEA must be accomplished through the administrative process, in the present action plaintiffs seek monetary damages for injuries allegedly sustained after a placement was initiated through an agreement between the District and plaintiff DiFerdinando. Monetary damages are generally not recoverable to a plaintiff bringing an administrative action under the IDEA. *See Waterman v. Marquette-Alger Intermediate School D*, 739 F. Supp. 361, 364 (W.D. Mich. 1990). The procedural mechanisms set forth in the IDEA are not designed to address plaintiffs' claim for money damages so that pursuit of an administrative remedy under the Act would be futile.

Plaintiffs are not required to exhaust administrative remedies under the circumstances of this case. Likewise, plaintiff DiFerdinando's agreement to mainstream Heidi into regular physical education classes does not bar this action. Defendants' Motion for Summary Judgment for Failure to Exhaust Administrative Remedies is denied.

IV.

Defendants contend that plaintiff DiFerdinando's claim for loss of consortium must be dismissed because it is inadequately pleaded. An allegation of intent to interfere with the familial relationship by a government actor is necessary to state a claim for loss of consortium under Section 1983. *See Apodaca v. Rio Arriba County Sheriff's Dept.*, 905 F.2d 1445, 1448 (10th Cir. 1990); *Trujillo v. Board of County Commissioners*, 768 F.2d 1186, 1190 (10th Cir. 1985).

Plaintiffs' complaint does not make the required allegation of intent to interfere with the familial relationship, nor has proof thereof been alleged in response to defendants' motion. Therefore, Defendants' Motion for Summary Judgment on plaintiff DiFerdinando's claim for loss of consortium is granted.

V.

Due to this Court's order granting summary judgment in favor of School District 9-R on plaintiffs' Section 1983 claim, Paintiffs' [sic] Motion for Summary Judgment on the Liability of Defendants must be addressed exclusively to defendant Oetter.

As this Court previously ruled in its Order of October 6, 1993, Plaintiffs' Motion is denied.

DATED this 18th Day of October, 1993.

BY THE COURT:

/s/ Timothy A. Patalan
Timothy A. Patalan

TAP/wmb

cc James Anesi
Michael McLachlan
Susan S. Schermerhorn

APPENDIX C

SUPREME COURT, STATE OF COLORADO
CASE NO. 95SC190
CERTIORARI TO THE COLORADO COURT
OF APPEALS, 93CA1870
DISTRICT COURT, LA PLATA COUNTY, 90CV117

ORDER OF COURT

HEIDI SANCHEZ, a minor, by and through her next friend, parent, and guardian, PEARL DIFERDINANDO f/k/a PEARL SANCHEZ and PEARL DIFERDINANDO f/k/a PEARL SANCHEZ, Individually,

Petitioners,

v.

SCHOOL DISTRICT 9-R,

Respondent.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and same hereby is, DENIED.

BY THE COURT, EN BANC, AUGUST 28, 1995.

cc:

James C. Anesi
1023 Main Avenue
Durango, CO 81301

Susan S. Schermerhorn
Kathleen O. Nistico
CAPLAN AND EARNEST, L.L.C.
2595 Canyon Blvd., Suite 400
Boulder, CO 80302-6737

Michael E. McLachlan
SHAND, MCLACHLAN & NEWBOLD, P.C.
P.O. Drawer I
Durango, CO 81302

Honorable Timothy A. Patalan
La Plata County District Court
La Plata County Courthouse
1060 Second Avenue
P.O. Box 3340
Durango, CO 81302-3340

Clerk of the District Court
La Plata County District Court
La Plata County Courthouse
1060 Second Avenue
P.O. Box 3340
Durango, CO 81302-3340

Patrick H. Stanford, Clerk
Colorado Court of Appeals

SUPREME COURT, STATE OF COLORADO
CASE NO. 95SC190
CERTIORARI TO THE COLORADO COURT
OF APPEALS, 93CA1870
DISTRICT COURT, LA PLATA COUNTY, 90CV117

ORDER OF COURT

HEIDI SANCHEZ, a minor, by and through her next friend, parent, and guardian, PEARL DIFERDINANDO f/k/a PEARL SANCHEZ and PEARL DIFERDINANDO f/k/a PEARL SANCHEZ, Individually,

Petitioners,

v.

SCHOOL DISTRICT 9-R,

Respondent.

Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition shall be, and the same hereby is, STRICKEN. C.A.R. 54(b).

BY THE COURT, SEPTEMBER 6, 1995.

cc:

James C. Anesi
1023 Main Avenue
Durango, CO 81301

Susan S. Schermerhorn
Kathleen O. Nistico
CAPLAN AND EARNEST, L.L.C.
2595 Canyon Blvd., Suite 400
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Michael E. McLachlan
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Durango, CO 81302

SUPREME COURT, STATE OF COLORADO
CASE NO. 95SC190
CERTIORARI TO THE COLORADO COURT
OF APPEALS, 93CA1870
DISTRICT COURT, LA PLATA COUNTY, 90CV117

ORDER OF COURT

HEIDI SANCHEZ, a minor, by and through her next friend, parent, and guardian, PEARL DIFERDINANDO f/k/a PEARL SANCHEZ and PEARL DIFERDINANDO f/k/a PEARL SANCHEZ, Individually,

Petitioners,

v.

SCHOOL DISTRICT 9-R,

Respondent.

Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition shall be, and the same hereby is, STRICKEN. C.A.R. 54(b).

BY THE COURT, SEPTEMBER 11, 1995.

cc:

James C. Anesi
1023 Main Avenue
Durango, CO 81301

Susan S. Schermerhorn
Kathleen O. Nistico
CAPLAN AND EARNEST, L.L.C.
2595 Canyon Blvd., Suite 400
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Michael E. McLachlan
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Durango, CO 81302

COURT OF APPEALS
STATE OF COLORADO
Court of Appeals Case No.93CA1870
Trial Court No. 90CV117

ORDER

HEIDI SANCHEZ ET AL V SCHOOL DIST., 9-R

Upon consideration of the Petition for Rehearing filed by the Appellant herein, the Opinion is Modified and as Modified, Petition for Rehearing is DENIED. It is ordered that issuance of the Mandate hereby be, and the same hereby is, stayed to and including March 27, 1995, provided that if a Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the

stay shall remain in effect until disposition of the within cause by the Supreme Court.

Plank, J.

Hume, J.

Roy, J.

DATED: February 23, 1995

APPENDIX D

DISTRICT COURT, COUNTY OF LA PLATA,
STATE OF COLORADO

Case No. 90CV117

COMPLAINT

HEIDI SANCHEZ, a minor, by and through her next friend, parent and guardian, PEARL DEFERDINANDO f/n/a PEARL SANCHEZ and PEARL DEFERDINANDO f/n/a PEARL SANCHEZ, individually,

Plaintiffs,

vs.

SCHOOL DISTRICT 9R, SAN JUAN BOARD OF COOPERATIVE SERVICES and SCHOOL DISTRICT 9R LOCAL INDIVIDUAL EDUCATION PROGRAM TEAM, including STEVE THWEATT individually, SUSAN LIVINGSTON individually, and LIZ OTTER individually,

Defendants.

RECITALS

1. The Plaintiff Heidi Sanchez will be referred to as Plaintiff Heidi and the Plaintiff Pearl DeFerdinando f/n/a Pearl Sanchez will be referred to as Plaintiff DeFerdinando.

2. School District 9R will be referred to as Defendant 9R.

3. San Juan Board of Cooperative Services will be referred to as Defendant BOCS.

4. Individual members of the Individual Education Program team Steve Thweatt, and Susan Livingston, will be referred to as Defendant IEP team.

5. Defendant Liz Otter will be referred to as Defendant Otter.

CERTIFICATE CONCERNING MANDATORY ARBITRATION

The within action is not subject to mandatory arbitration in that the potential recovery would exceed the sum of $50,000.00 and this is not an equitable action.

FIRST CAUSE OF ACTION

1. The Plaintiff Heidi is a handicapped child as defined under both C.R.S. 22-20-108 *et seq* and under Federal Statute 20 U.S.C. 1400 *et seq* and under the Rehabilitation Act of 1973, and as such is entitled to a free, appropriate, safe public education which emphasis [sic] special education and related services designed to meet her unique needs, which education is the responsibility of the Defendant 9R, Defendant BOCS, Defendant IEP team, and Defendant Otter.

2. The Defendant 9R, Defendant BOCS, and Defendant IEP team received both state and federal funds to carry out the purposes of C.R.S. 22-20-108 *et seq* and 20 U.S.C. 1400 *et seq* and the Rehabilitation Act of 1973.

3. The Defendant 9R, Defendant BOCS, and Defendant IEP team are required to develop an individual

education program and place Plaintiff Heidi in such program as to meet her unique needs with the use of supplementary aids, services, and special educators.

4. The Defendant 9R, Defendant BOCS, Defendant IEP team and Defendant Otter knew or should have known of the Plaintiff Heidi's unique needs as a handicapped child and by acts of negligence, gross negligence, arbitrary and indifferent procedures and reckless acts, placed Plaintiff Heidi in a regular P.E. class without the use of supplementary aids, special services, or special educators as required by both state and federal statutes, thereby causing permanent injury to Plaintiff Heidi.

5. The Defendant 9R, Defendant BOCS, and Defendant IEP team received state and federal funds to allow for an independent educational program with supplementary aids and services, and as a matter of custom and/or policy, have arbitrarily and with deliberate indifference and by reckless actions and gross negligence, failed and refused to apply such funds for the unique educational needs of Plaintiff Heidi, and further failed to provide Plaintiff Heidi with supplementary aids and special services and special teachers which are necessary to allow her to participate safely in a regular P.E. program as required by 20 U.S.C. 1414.

6. Plaintiff Heidi's unique physical and mental needs were known to Defendant 9R, Defendant BOCS, Defendant IEP team, and Defendant Otter, and all of the said Defendants acting in bad faith with deliberate indifference and in an arbitrary manner placed Plaintiff Heidi in a regular P.E. class when they knew that she could only participate in 23% of such activities, and without any

supplementary aids or special services as required by state and federal statutes for the education of handicapped children.

7. The Plaintiff Heidi was required by Defendant 9R, Defendant BOCS, Defendant IEP team, and Defendant Otter to participate in a regular P.E. gymnastics class as a part of her regular mandatory education and on or about 3/8/89, she participated in a regular P.E. class which was not designed to her unique needs, and as a result of the bad faith, deliberate indifference, gross negligence and reckless and outrageous conduct of the Defendant 9R, Defendant BOCS, Defendant IEP team, and Defendant Otter, Plaintiff Heidi was injured and permanently and severely injured, requiring surgical intervention.

8. The Defendant 9R, Defendant BOCS, and Defendant IEP team were acting under the color of state law and all of the Defendants' conduct deprived the Plaintiff Heidi of her rights, liberties, and privileges in violation of the Fourteenth Amendment of the U.S. Constitution, and under 42 U.S.C. 1983.

9. The Plaintiff Heidi has been denied her constitutional right to liberty, has been denied both substantive and procedural due process, and equal protection of law under the Fourteenth Amendment of the U.S. Constitution.

10. The Defendant 9R, Defendant BOCS, Defendant IEP team, and Defendant Otter knew of Plaintiff Heidi's particular handicaps and her physical limitations, yet without proper testing and review or procedural safeguards, arbitrarily and with deliberate indifference,

allowed Plaintiff Heidi to participate in a regular P.E. class without special procedures or services, and with the express knowledge and information that she had physical limitations and could not participate actively in a regular P.E. gymnastics class without damage or injury, which amounts to outrageous conduct on the part of the named Defendants.

11. The Defendant 9R, Defendant BOCS, and Defendant IEP team and Defendant Otter had a duty to provide a safe environment for the physical education of the Plaintiff Heidi and failed to do so, and thereby discriminated against Plaintiff Heidi in violation of §504 of the Rehabilitation Act of 1973 and federal constitutional statutory rights to a free and appropriate and safe education.

WHEREFORE THE PLAINTIFF PRAYS as set forth in the General Prayer Clause.

SECOND CAUSE OF ACTION

12. The Plaintiff incorporates the allegations contained in the First Cause of Action as if set forth in verbatim.

13. The Defendant Otter knew of the specific handicaps of the Plaintiff Heidi, as the Defendant Otter had previously tested the Plaintiff Heidi for gross and/or fine motor abilities prior to the injury.

14. On or about 3/8/89, the Defendant Otter was conducting a regular P.E. class with three separate gymnastics activities without any assistance.

15. The Defendant Otter knew or should have known Plaintiff Heidi's physical limitations and needs,

but nevertheless, allowed Plaintiff Heidi to participate in a gymnastics vaulting activity unsupervised and without proper spotters or proper safety protections, and thereby as a direct and proximate result of the gross negligence, deliberate indifference and outrageous conduct, the Plaintiff Heidi injured herself in attempting to comply with the requirements of her P.E. class.

16. The Defendant Otter failed to give proper and adequate supervision and acting under the color of state law, and in bad faith, and with reckless action, deprived Plaintiff Heidi of her rights, privileges and liberties under the federal statutes and U.S. Constitution, and deprived Plaintiff Heidi of her rights of due process and equal protection in violation of the Fourteenth Amendment and 42 U.S.C. 1983.

WHEREFORE, THE PLAINTIFF prays as set forth in the General Prayer Clause.

THIRD CAUSE OF ACTION

17. The Plaintiff incorporates the allegations contained in the First and Second Cause of Action as if set forth in verbatim.

18. The Plaintiff Heidi has been permanently injured because of the actions of the above named Defendants and will be unable to be gainfully employed and enjoy the benefits and liberties of emancipation, all of which are a direct and proximate result of the Defendants' actions complained of herein.

19. The Plaintiff DeFerdinando, as Plaintiff Heidi's parent and guardian, will be required to care for the

Plaintiff Heidi for a period well beyond her majority, and perhaps the rest of Plaintiff Heidi's life, all of which is a result of the Defendants' actions complained of herein.

20. The Plaintiff DeFerdinando has been deprived of the companionship, love, affection, mutual enjoyment and interrelationship between a parent and child by the actions of the Defendants, acting under color of state law, which depravation is all in violation of the Fourteenth Amendment, due process, and equal protection, rights, and in violation of 42 U.S.C. 1983.

21. Colorado statues [sic] for recovery of damages complained of herein by Plaintiff DeFerdinando are inhospitable and inconsistent with the rights allowed by 42 U.S.C. 1983 and therefore, the Plaintiff DeFerdinando has a right to recover for damages she has received to her child and which will cause inconvenience, suffering, and expense to her in the future.

WHEREFORE, THE PLAINTIFF prays as set forth in the General Prayer Clause.

FOURTH CAUSE OF ACTION

22. The Plaintiff incorporates the allegations contained in the First, Second, and Third Cause of Action as if set forth in verbatim.

23. The Defendant 9R owed a duty to provide a safe, free and appropriate education to Plaintiff Heidi; however failed in that duty by allowing a dangerous condition of a public building and a dangerous condition of a recreation area, which dangerous conditions were a direct and proximate cause of the injury to Plaintiff Heidi.

24. As a result of the Defendants' actions complained of herein, the Plaintiff Heidi has suffered injury to her muscular, skeletal and nervous systems, and will continue to suffer past, present, and future pain and suffering, and has incurred and will continue to incur medical and pharmaceutical bills and future loss of income, all a direct and proximate result of the Defendants' actions complained of herein.

25. The Plaintiffs are entitled to recover reasonable attorney's fees pursuant to 42 U.S.C. 1988.

26. The Defendants are subject to joint and severable liability.

WHEREFORE, THE PLAINTIFFS pray for relief as follows:

(a) Past, present and future general and special damages;

(b) Exemplary damages and damages for outrageous conduct;

(c) Damages for interference with a parent/child relationship, love, companionship and consortium.

(d) Damages for past, present and future costs of treatment for Plaintiff Heidi, and special treatment facilities throughout her lifetime;

(e) Attorney's fees, costs, interest, and such other and further relief as the court deems just and proper.

THE PLAINTIFFS DEMAND A TRIAL TO A JURY OF THE MAXIMUM NUMBER ALLOWABLE UNDER THE RULES OF CIVIL PROCEDURE ON ALL ISSUES OF FACT.

DATED this 7th day of May, 1990.

Respectively submitted,

/s/ James C Anesi
James C. Anesi, P.C. #1364
Attorney for Plaintiff
2023 Main Avenue
Durango, Colorado 81301
(303) 247-8720

Address of Plaintiffs:

8582 Highway 550
Durango, Colorado 81301

DISTRICT COURT, LA PLATA COUNTY, COLORADO

Case No. 90 CV 117

FIRST AMENDED COMPLAINT

HEIDI SANCHEZ, et al.,

Plaintiffs,

vs.

SCHOOL DISTRICT 9-R and Liz Oetter, Individually,

Defendants.

COMES NOW the Plaintiffs, by and through their attorney, James C. Anesi, P.C., and submit the following First Amended Complaint to-with:

RECITALS

1. The Plaintiff Heidi Sanchez will be referred to as Plaintiff Heidi and the Plaintiff Pearl DiFerdinando f/n/a Pearl Sanchez will be referred to as Plaintiff DiFerdinando.

2. School District 9-R will be referred to as Defendant 9-R.

3. Defendant Liz Oetter will be referred to as Defendant Oetter.

FIRST CAUSE OF ACTION

1. The Plaintiff Heidi is a handicapped child as defined under both C.R.S. §22-20-108 et. seq. and under Federal Statute 20 U.S.C. §1400 et. seq. and under Rehabilitation Act of 1973, and as such is entitled to a free, appropriate, safe public education which emphasis [sic] special education and related services designed to meet her unique needs, which education is the responsibility of the Defendant 9-R and Defendant Oetter.

2. The Defendant 9-R pursuant to 20 U.S.C. §1400 et. seq. received both State and Federal funds to carry out the purposes of C.R.S. §22-20-108 et. seq. and 20 U.S.C. §1400 et. seq. and the Rehabilitation Act of 1973.

3. Defendant 9-R is required to educate Plaintiff Heidi by an individualized education program and place Plaintiff Heidi in such program to meet her unique needs with the use of supplementary aides and services and special educators.

4. Defendant 9-R and Defendant Oetter knew or should have known of Plaintiff Heidi's unique physical and mental handicaps and by acts of recklessness, gross negligence, deliberate indifference, and breach of good faith duties, placed Heidi in a regular physical education class without individualizing her program or use of supplemental aides or services or special educators as required by both State and Federal Statutes thereby causing permanent injury to the Plaintiffs.

5. Defendant 9-R having received State and Federal funds were required by 20 U.S.C. §1400 et. seq. to properly train and educate its teachers in meeting the goals of 20 U.S.C. §1400 et. seq. by giving Plaintiff Heidi independent educational program and with the use of supplemental aides and services, yet by deliberate indifference failed and refused to apply any funds in training or in educating its teachers in physical education so as to comply with the unique educational needs of Plaintiff Heidi being a known violation of 20 U.S.C. §1400 et. seq. by Defendant 9-R.

6. Plaintiff Heidi's unique physical and mental needs were known to Defendant 9-R and Defendant Oetter and all of said Defendants acted with deliberate indifference and breach of their good faith duties and in a reckless and grossly negligent manner by failing to give Heidi her individual and unique education.

7. Defendant 9-R and Defendant Oetter as a part of a mandatory regular education, on March 8, 1989, failed to comply with the State of Colorado's policy of "welfare of its children" and the dictates of the Education of Handicapped Act, 20 U.S.C. §1400 et. seq. and as a result of the

reckless, grossly negligent, deliberate indifference, and breach of good faith duties by Defendant 9-R and Defendant Oetter, injured Heidi severely and permanently requiring surgical intervention and continuing medical services.

8. Defendant 9-R and Defendant Oetter were acting under the color of State law and all of the Defendants' conduct deprived Plaintiff Heidi of her rights, liberties, and privileges in violation of the Fourteenth Amendment of the United States Constitution, and under 42 U.S.C. §1983 and 20 U.S.C. §1400 et. seq.

9. Plaintiff Heidi has been denied her constitutional right to liberty, and the right to a unique individualized education and has been denied both substantive and procedural due process, and equal protection of law under the Fourteenth Amendment of the U.S. Constitution by the Defendants.

10. Defendant 9-R and Defendant Oetter knew of Plaintiff Heidi's particular physical and mental handicaps, yet though acts of deliberate indifference, recklessness, gross negligence, breach of bad faith duty, allowed her to participate in a regular physical education class without proper supervision, special services, or aides, and with express knowledge that Heidi had physical and mental limitations which would not allow her to participate actively in a vaulting gymnastics class without damage or injury in violation of 20 U.S.C. §1400 et. seq.

11. Defendant 9-R and Defendant Oetter owed a duty to provide a safe educational environment in a physical education class for the Plaintiff Heidi and failed to do so and thereby discriminated against Heidi in violation of 20

U.S.C. §1400 et. seq. and §504 of the Rehabilitation Act of 1973 and State and Federal statutes and constitutional rights to a free and appropriate safe education.

12. Defendant 9-R and Defendant Oetter with deliberate indifference and in violation of the State of Colorado and School District 9-R's standards and policies of education as well as the rights involved pursuant to 20 U.S.C. §1400 et. seq. and §504 of the Rehabilitation Act of 1973, displayed an intent to interfere with the family relationship (which is specifically addressed in 20 U.S.C. §1400(c)) between Plaintiff Heidi and her mother hereby causing severe and permanent injuries to Heidi.

13. Defendant 9-R had a consistent pattern of failing to train its teachers from the period from 1985 through 1989 in the proper educational techniques to instruct handicapped children in a gymnastics class and received approximately $185,000.00 per year from State and Federal sources for the education of handicapped children. Such policy or custom of School District 9-R in not educating or training its teachers, evidences a persistent pattern of intent to interfere with the family relationship between Plaintiff Heidi and her mother in violation of 20 U.S.C. §1400(c) and knew or should have known that Plaintiff DiFerdinando would have to care for and treat Heidi throughout her adult life as a result of the injuries which resulted in the failure of properly training and educating their teachers and to apply safety standards.

14. Defendant School District 9-R was responsible for the welfare of Heidi and knew or should have known of asserted dangers by its failure to train and review the competence of Defendant Oetter yet consciously failed to

safeguard Heidi from danger and knew or should have known that her injury would interfere with her relationship with her mother Pearl DiFerdinando. The injuries where [sic] were the direct and proximate result of the failure to train, supervise and direct Defendant Oetter and apply mandatory safety standards.

15. Defendant School District 9-R's officials owed a duty to supervise, direct, and train Defendant Oetter under 20 U.S.C. §1400 et. seq. and C.R.S. §22-60-102, so as to protect Plaintiff Heidi from hazards which the school officials knew or should have known which would occur from improper training, supervision and direction. School District 9-R's officials were deliberately indifferent in determining the competence, education, training, supervision, and direction of Defendant Oetter, which was a direct and proximate cause of the injury to Heidi.

16. Defendant School District 9-R failed to provide adequate protection to Plaintiff Heidi and was deliberately indifferent to the individual and unique education needs of Heidi mandated by 20 U.S.C. §1400 et. seq.

17. The policy and custom of School District 9-R in failing to train, supervise and direct its teachers caused a constitutional violation to Heidi and amounted to deliberate indifference as Defendant Oetter was the final person in charge of Heidi's education and safety by School District 9-R policy.

18. School District 9-R had a custom and policy of allowing the final decision making authority concerning what subjects would be taught, how they would be taught and the manner in which they would be taught

with its teacher, Defendant Liz Oetter, making her decisions unquestionably an act of official government policy.

19. Defendant Oetter made a deliberate choice to follow a course of action made from the various alternatives, and as the official responsible for establishing final policies with respect to the unique and individual education for Heidi and is therefore liable under 42 U.S.C. §1983.

20. School District 9-R in developing a physical education Curriculum in 1985, knew or should have known that the Curriculum would be used to educate handicapped children mainstreamed into regular physical education classes and yet with deliberate indifference, failed to include a significant safety section in its Curriculum Guide for grades K-6.

21. School District 9-R included a specific safety and spotting guide for teachers of grades 7-12, specifically addressing safety and proper spotting in education [sic] children in gymnastics. Officials of Defendant 9-R have been on notice since 1985 that the K-6 Curriculum Guide in gymnastics was deficient in addressing safety concerns or in addressing the education of handicapped children in gymnastics. The officials responsible for the adoption of the Curriculum Manuals made a conscious choice to delete from the K-6 Curriculum Manual the proper and necessary section on instructing and teaching gymnastics safety as it applies to the education of handicapped children in compliance with 20 U.S.C. §1400 et. seq.

WHEREFORE the Plaintiff prays as set forth in the General Prayer Clause.

SECOND CAUSE OF ACTION

15. The Plaintiff incorporates the allegations contained in the First Cause of Action as if set forth in verbatim.

16. Defendant Oetter knew of the specific handicaps of Plaintiff Heidi, as Defendant Oetter had previously tested Plaintiff Heidi for gross and/or fine motor abilities prior to the injury.

17. On or about March 8, 1989, Defendant Oetter was conducting a regular physical education class with three separate gymnastics activities without proper supervision or assistance concerning the vaulting activity.

18. Defendant Oetter knew or should have known Plaintiff Heidi's physical limitations and needs and her right to an individualized unique education, but nevertheless, allowed Plaintiff Heidi to participate in a gymnastics vaulting activity unsupervised and without proper training of the student spotters or proper safety protection, and thereby as the direct and proximate result of the reckless, grossly negligent, and deliberately indifferent actions, and in breach of her good faith duty to Heidi, caused Heidi to injure herself in attempting to comply with the requirements of Defendant Oetter in a physical education class.

19. Defendant Oetter failed to give proper and adequate supervision or training to the student spotters and acted under the color of State and Federal law and acted in bad faith with recklessness, gross negligence, with deliberate indifference and deprived Plaintiff Heidi of her rights, privileges and liberties under the Federal and State statutes and the United States Constitution and deprived

Heidi of her right of due process and equal protection in violation of the Fourteenth Amendment and 42 U.S.C. §1983 and 20 U.S.C. §1400 et. seq.

WHEREFORE the Plaintiffs pray for relief as follows:

a) Past, present, and future general and special damages;

b) Exemplary damages;

c) Damages for interference with a parent/child relationship;

d) Damages for past, present, and future costs of treatment for Plaintiff Heidi, and special treatment facilities throughout her lifetime;

e) Attorney fees, costs, interest, and such other and further relief as the Court deems just and proper.

Respectfully submitted this 8th day of October, 1993.

/s/ James C Anesi
JAMES C. ANESI, No. 1364
2023 Main Ave.
Durango, CO 81301
303-247-8720

CERTIFICATE OF MAILING

I hereby certify that I have placed a true and correct copy of the foregoing document of the above captioned action into the United States Mail, postage prepaid, dated this 18th day of October, 1993, and addressed as follows:

Michael McLachlan
Shand, McLachlan & Newbold
P.O. Drawer I
Durango, Colorado 81302

Susan S. Schermerhorn
Caplan and Ernest
2595 Canyon Blvd., No. 400
Boulder, CO 80302-6737

/s/ Christine Ellis
Christine Ellis

APPENDIX E

42 U.S.C. § 1983

Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, or the District of Columbia, subjects or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, sued in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be construed to be a statute of the District of Columbia.

The Elementary and Secondary Education Act of 1965:

20 U.S.C. § 1400(b):

> **Findings**. The Congress finds that –
>
> (1) there are more than eight million handicapped children in the United States today;
>
> (2) the special educational needs of such children are not being fully met;
>
> (7) developments in the training of teachers in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of handicapped children. . . .

20 U.S.C. § 1400(c):

Purpose.

It is the purpose of this Act to assure that all handicapped children have available to them, within the time periods specified in section 612(2)(B) [20 U.S.C. § 1412 (2)(B), a free, appropriate, public education which emphasizes special education and related services designed to meet their unique needs. . . .

20 U.S.C. § 1401:

(9) The term "elementary school" means a day or residential school which provides elementary education, as determined under State law.

(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction and instruction in hospitals and institutions.

(17) The term "related services" means transportation, and such developmental, corrective and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services. . . .

(18) The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge. (B) Meet the standards of State educational agency and (C) include an

appropriate pre-school, elementary or secondary school education in the State involved and (D) are provided in conformity with the individualized education program required under § 614(a)(5).

(19) The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local education agency or an intermediate educational unit who shall be qualified to provide, or supervise any provision of, specially designed education to meet the unique needs of the handicapped child. . . .

20 U.S.C § 1413. State plans

(a) Requisite features. Any State meeting the eligibility requirements set forth in section 612 [20 U.S.C. § 1412] and desiring to participate in the program under this part shall submit to the Secretary, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information as the Secretary deems necessary. Each such plan shall –

(3) describe, consistent with the purposes of this Act and with the comprehensive system of personnel development described in section 676(b)(8) [20 U.S.C. § 1476(b)(8)] a comprehensive system of personnel development that shall include –

(B) a description of the procedures and activities the State will undertake to ensure that all personnel necessary to carry out this part are appropriately and adequately prepared, including –

(i) a system for the continuing education of regular and special education and related services personnel. . . .

20 U.S.C. § 1414

Application

(a) Requisite features. A local educational agency or an intermediate educational unit which desires to receive payments under section 611(d)[20 U.S.C.S. § 1414(d)] for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall. . . .

(C) establish a goal of providing full educational opportunities to all children with disabilities. . . .

(5) provide assurances that the local educational agency or intermediate education unit will establish or revise, whichever is appropriate, an individualized education program for each child with a disability. . . .

The Rehabilitation Act of 1973

29 U.S.C. § 794

Nondiscrimination under federal grants and programs; Promulgation of Rules and Regulations

(a) Promulgation of nondiscriminatory rules and regulations; copies to appropriate committees. No otherwise qualified individual with handicaps in the United States, as defined in § 7(8)[29 U.S.C. § 706(8)], shall, solely by reason

of his or her handicap, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of such agency shall promulgate such regulations as may be necessary to carry out the amendments to this Section made by the Rehabilitation Comprehensive Services and Developmental Disabilities Act of 1978. . . .

(b) **"Program or activity" defined.** For purposes of this section, the term "program or activity" means all the operations of –

(2)(B) a local educational agency (as defined in § 1471(12) of the Elementary and Secondary Education Act of 1965 [20 U.S.C. § 2891(12)]), system of vocational education, or other school system;

34 CFR 104.33 **Free appropriate education.**

(a) General. A recipient that operates a public elementary or secondary program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) Appropriate education. (1) For the purpose of this sub-part, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non handicapped persons are met. . . .

34 CFR 104.37 **Non academic services.**

> (c) Physical education and athletics. (1) In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this sub-part applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors interscholastic, club or intermural activities shall provide to qualified handicapped students an equal opportunity for participation in these programs.

Appendix A, Subpart D – Preschool, Elementary and Secondary Education:

> "The quality of the educational services provided to handicapped students must equal that of services provided to non-handicapped students; thus, handicapped students' teachers must be trained in the instruction of persons with the handicap in question and appropriate materials and equipment must be available."